

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
JOHNNY RODRIGUEZ,

Petitioner,

- against -

JAMIE LAMANNA,

Respondent.  
-----X

20-CV-7547 (GBD) (RWL)

**ORDER**

**ROBERT W. LEHRBURGER, United States Magistrate Judge.**

Respondent has filed a letter motion to dismiss the Petition as untimely as set forth in Dkt. 12. The Court accepts the letter as a limited answer to the Petition. Petitioner shall file a response, if any, by **April 15, 2021**. Absent a response, the Court will proceed to resolve the motion.

SO ORDERED.

A handwritten signature in black ink, appearing to be "R. Lehrburger", written over a horizontal line.

ROBERT W. LEHRBURGER  
UNITED STATES MAGISTRATE JUDGE

Dated: March 4, 2021  
New York, New York

Copies transmitted this date to all counsel of record. The Clerk's Office is directed to mail a copy of this Order to Petitioner pro se and note service on the docket:

Johnny Rodriguez  
DIN No. 13A4026  
Downstate Correctional Facility  
P.O. Box F  
Red Schoolhouse Rd.  
Fishkill, NY 12524



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES  
ATTORNEY GENERAL

CRIMINAL APPEALS & FEDERAL HABEAS BUREAU

March 3, 2021

**By ECF**

Hon. Robert W. Lehrburger  
Daniel Patrick Moynihan  
United States Courthouse  
500 Pearl Street  
New York, NY 10007-1312

Re: *Rodriguez v. LaManna*, No. 20 Civ. 7547 (GBD)(RWL)

Your Honor:

I represent the respondent in the above-referenced *pro se* § 2254 habeas action. I write to request permission to limit the answer to the issue of whether the Petition (“Pet.”) is untimely. If granted, I request that the Court accept this letter as that limited answer. As explained below, petitioner filed the Petition more than 7 months after expiration of the one-year limitations period. 28 U.S.C. § 2244(d). Moreover, the Petition fails to set forth circumstances under which the Petition could be timely.<sup>1</sup> In the event the Court denies this application, respondent seeks an extension of two weeks from the Court’s decision to file a complete answer.

**I. Procedural History**

On 22 separate occasions between April 2011 and March 2012, Johnny Rodriguez (“petitioner”) sold cocaine to an undercover New York City Police Department (“NYPD”) detective. For all but two of those sales, petitioner was personally present during the sale. Petitioner was also present when, in November

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<sup>1</sup> As explained in respondent’s two requests for extension (ECF #8, 10), there were significant delays obtaining the relevant state court records from the New York County District Attorney’s office. As a result, the undersigned did not receive documentation supporting the instant motion until after the most-recent extension request.

Hon. Robert W. Lehrburger

March 3, 2021

Page 2 of 5

2011, he sold the detective a loaded semiautomatic handgun, and when, the following month, he sold the detective a second semiautomatic handgun.

In May 2013, following a jury trial, petitioner was found guilty of 31 offenses, including two first-degree cocaine sales (Penal Law § 220.43(1)), four second-degree cocaine sales (Penal Law § 220.41(1)), one third-degree firearm sale (Penal Law § 265.11(1)), and one attempted third-degree firearm sale (Penal Law §§ 110, 265.11(1)).<sup>2</sup> The trial court sentenced petitioner as a mandatory persistent violent felony offender to an aggregate prison term of 30 years to life, followed by 5 years' post-release supervision ("PRS").

Prior to perfecting a direct appeal, petitioner filed in the trial court a *pro se* post-conviction motion, *see* N.Y. C.P.L. § 440.10, alleging ineffective assistance of trial counsel. The trial court denied the motion without a hearing in September 2016. Petitioner thereafter sought leave to appeal that denial to the Appellate Division, First Department. The First Department granted leave and consolidated that appeal with petitioner's pending direct appeal. After petitioner perfected both appeals, the Appellate Division unanimously affirmed both the conviction and the denial of petitioner's C.P.L. § 440.10 motion. *People v. Rodriguez*, 163 A.D.3d 437 (1st Dep't 2018). Petitioner sought leave to appeal to the New York Court of Appeals, but that Court denied the application by order dated October 18, 2018. *People v. Rodriguez*, 32 N.Y.3d 1067 (2018).

By papers dated January 22, 2020, which petitioner mailed to the New York County Supreme Court on January 23, 2020, petitioner moved pursuant to C.P.L. § 440.20 to vacate his 30-year sentences for first-degree criminal sale of a controlled substance. A copy of that motion is attached hereto as **Exhibit 1**. The court denied that motion on April 20, 2020. A copy of the court's decision is attached hereto as

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<sup>2</sup> The other convictions were on 15 counts of third-degree criminal sale of a controlled substance (Penal Law § 220.39(1)), 2 counts of second-degree criminally using drug paraphernalia (Penal Law § 220.50(2)), and one count each of third-degree criminal possession of a controlled substance (Penal Law § 220.16(1)), fourth-degree criminal possession of a controlled substance (Penal Law § 220.09(1)), second-degree criminal possession of a weapon (Penal Law § 265.03(3)), attempted second-degree criminal possession of a weapon (Penal Law §§ 110, 265.03(3)), attempted third-degree criminal possession of a weapon (Penal Law §§ 110, 265.02(1)), and resisting arrest (Penal Law § 205.30). The jury found petitioner not guilty of a single count of third-degree weapons possession.

Hon. Robert W. Lehrburger

March 3, 2021

Page 3 of 5

**Exhibit 2.** Petitioner admittedly did not seek leave from the Appellate Division to appeal the denial of his C.P.L. § 440.20 motion. (Pet. at 7 ¶11(d)(3).)<sup>3</sup>

Petitioner filed the instant Petition on September 6, 2020. (Pet. at 24.) The Petition raises four claims: (1) a Sixth Amendment claim based on the trial court's order closing the courtroom during the undercover NYPD detective's testimony; (2) a claim that petitioner was entitled to an adverse inference jury instruction or other remedy based on a loss of evidence caused by Superstorm Sandy; (3) an ineffective assistance of trial counsel claim based on some, but not all, of the grounds raised in state court; and (4) an excessive sentencing claim.

## II. The Petition is Clearly Untimely

Habeas petitions by those “in custody pursuant to a judgment of a State court” are subject to a one-year limitations period which, as applicable here, runs from the date on which the conviction became final “by the conclusion of direct review or the expiration of the time for seeking such review.”<sup>4</sup> 28 U.S.C. § 2244(d)(1)(A). Generally, this occurs when a petitioner's time to seek direct review in the United States Supreme Court by writ of certiorari expires. *See Williams v. Artuz*, 237 F.3d 147, 151 (2d Cir. 2001).

Here, the New York Court of Appeals denied petitioner's direct-appeal leave application on October 18, 2018, and petitioner did not seek certiorari from the Supreme Court. Petitioner's state court conviction thus became final ninety days later, on January 17, 2019, when the 90-day window for seeking certiorari expired. 28 U.S.C. § 2244(d)(1)(A); *Williams v. Artuz*, 237 F.3d 147 (2d Cir. 2001); *Feliciano v. Lee*, 18 Civ. 9591 (GHW), 2020 U.S. Dist. LEXIS 155621, at \*9 (S.D.N.Y. Aug. 26, 2020). His federal habeas petition was due one year after that, on January 17, 2020. Because petitioner did not file until September 6, 2020, the petition is untimely by more than 7 months, unless statutory or equitable tolling applies. Petitioner fails to make any such showing, however.

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<sup>3</sup> Citations to docket entries refer to the page numbers generated by ECF appearing in the upper-right corner of each page.

<sup>4</sup> The onset of the limitations period may be delayed where state action creates an impediment to filing any state court application, where the Supreme Court subsequently recognizes a new constitutional right, or where a petitioner has discovered a new factual predicate for a claim that he or she, through due diligence, could not have discovered sooner. *See* 28 U.S.C. § 2244(d)(1)(B)-(D). However, nothing in the Petition suggests that any of these alternative onset dates apply here.

Hon. Robert W. Lehrburger

March 3, 2021

Page 4 of 5

AEDPA's one-year limitations period is tolled while "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). Here, petitioner contends that his C.P.L. § 440.20 resentencing motion tolled the limitations period from August 12, 2019 to April 24, 2020. (Pet. at 23.) But petitioner did not serve and file that motion until January 23, 2020.<sup>5</sup> (Exhibit 1, affidavit of service). Accordingly, petitioner was not entitled to statutory tolling during the pendency of the resentencing motion because it was filed six days after the limitations period expired. A state court motion must be pending during the AEDPA limitations period in order to toll that period. *See Diaz v. Kelly*, 515 F.3d 149, 152 (2d Cir. 2008); *Fernandez v. Artuz*, 402 F.3d 111, 116 (2d Cir. 2005); *Alvarez v. Perez*, 14 Civ. 8088 (VB), 2017 U.S. Dist. LEXIS 40772, at \*12 (S.D.N.Y. Mar. 20, 2017). Accordingly, the Petition is untimely.

Equitable tolling of the limitations period is also available, but only if petitioner can demonstrate, "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (internal quotation marks and citation omitted). Petitioner bears the burden of establishing that he is entitled to equitable tolling. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Here, petitioner has not met that burden. He alleges no basis for equitable tolling, instead relying exclusively on statutory tolling. (Pet. at 23.)

Nor has petitioner alleged a basis for avoiding the limitations period altogether based on a claim of "actual innocence." *McQuiggin v. Perkins*, 569 U.S. 383, 386-87 (2013); *Mattera v. United States*, 16 Civ. 0783 (RJS), 2020 U.S. Dist. LEXIS 27169, at \*12-13 (S.D.N.Y. Feb. 18, 2020). Such a claim requires "new evidence" of innocence so compelling that, if heard by the jury, it is "more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *House v. Bell*, 547 U.S. 518, 536-37 (2006); accord *McQuiggin*, 569 U.S. at 386-87 ("tenable actual-innocence gateway pleas are rare"); *Sabir v. United States*, 12 Civ. 8937 (LAP), 2020 U.S. Dist. LEXIS 192391, at \*15 n.3 (S.D.N.Y. Oct. 16, 2020). Here, petitioner has not alleged any new evidence of innocence.

Accordingly, for the foregoing reasons respondent respectfully requests permission to limit its response to the issue of timeliness, and that the Petition be dismissed as untimely. In the event the Court denies that motion, respondent seeks a two-week extension from the Court's decision to file a complete answer.

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<sup>5</sup> This office has conferred with the Clerk's Office of New York County Supreme Court and has been advised that petitioner did not file any motions in August 2019.

Hon. Robert W. Lehrburger

March 3, 2021

Page 5 of 5

I have not conferred with *pro se* petitioner as he is incarcerated. Pursuant to 28 U.S.C. § 1746 I declare that, on this date, I caused petitioner to be served with a copy of this letter, including all attachments and copies of all unpublished decisions cited herein, by causing it to be mailed by First-Class United States Mail to the address listed below.

Respectfully submitted,

/s/ Matthew Keller

Matthew Keller

Assistant Attorney General

28 Liberty Street

New York, New York 10005

(212) 416-6072

cc: Mr. Johnny Rodriguez (regular mail)

DIN No. 13A4026

Downstate Correctional Facility

P.O. Box F

Red Schoolhouse Rd.

Fishkill, New York 12524





SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CRIMINAL TERM: PART 93

THE PEOPLE OF THE STATE OF NEW YORK,	\$	NOTICE OF
	\$	MOTION TO
Respondent,	\$	SET ASIDE
	\$	SENTENCE
-against-	\$	CPL § 440.20
JOHNNY RODRIGUEZ,	\$	Ind No. 3051/2012
	\$	
Defendant.	\$	

Your Honor:

PLEASE TAKE NOTICE that upon the annexed affidavit of Johnny Rodriguez, a Motion to Set Aside Sentence will be made to the Supreme Court Justice Ellen N. Biben, located at 100 Centre Street, New York, New York 10013, on the            day of            , 20    , at 9:30 a.m., for the following relief:

- A) SETTING ASIDE THE SENTENCE UPON THE GROUND THAT IT WAS UNAUTHORIZED, ILLEGALLY IMPOSED OR OTHERWISE INVALID AS A MATTER OF LAW WHEN DEFENDANT WAS SENTENCED TO 30 YRS FOR CRIMINAL SALE OF CONTROLLED SUBSTANCE IN THE FIRST DEGREE DESPITE THE FACT THAT DEFENDANT IS NOT A SECOND FELONY DRUG OFFENDER PREVIOUSLY CONVICTED OF A VIOLENT FELONY OFFENSE. PENAL LAW § 70.71 (4);
- B) MODIFYING DEFENDANT'S SENTENCE OF CRIMINAL SALE OF CONTROLLED SUBSTANCE IN THE FIRST DEGREE A FIRST FELONY DRUG OFFENDER. PENAL LAW § 70.71 (2); AND
- C) FOR AN ORDER GRANTING AN EVIDENTIARY HEARING AS AUTHORIZED BY CPL § 440.30[5] IN ORDER TO MAKE FINDINGS OF FACT ESSENTIAL TO THE DETERMINATION THEREOF.

RECEIVED

JAN 28 2020

SUPREME COURT  
CRIMINAL TERM  
NEW YORK COUNTY  
C.A.P. UNIT/MOTION  
SUPPORT UNIT

Respectfully submitted,

*A. Pacheco*  
Johnny Rodriguez, 13A4026  
Pro se  
Downstate Correctional Fac.  
Box F  
Red Schoolhouse Road  
Fishkill, NY 12524

cc: Cyrus R. Vance, Jr.  
District Attorney's Office  
One Hogan Place  
New York, NY 10013



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CRIMINAL TERM: PART 93

THE PEOPLE OF THE STATE OF NEW YORK,	\$	AFFIDAVIT IN
	\$	SUPPORT OF
Respondent,	\$	MOTION TO
	\$	SET ASIDE
-against-	\$	SENTENCE
	\$	CPL § 440.20
JOHNNY RODRIGUEZ,	\$	Ind No. 3051/2012
	\$	
Defendant.	\$	

STATE OF NEW YORK )  
COUNTY OF DUTCHESS ) SS;

I, Johnny Rodriguez, being duly sworn, deposes and states that:

1. I am the defendant herein, and I am currently incarcerated in the Downstate Correctional Facility, located at Red Schoolhouse Road, Fishkill, New York 12524-0445.

2. I make this affidavit in support of Motion to Set Aside Sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law when I was sentenced to 30 years for Criminal Sale of Controlled Substance in the first degree despite the fact that I am not a Second Felony Drug Offender Previously Convicted of a Violent Felony Offense, as identified in Penal Law § 70.71(4).

3. I seek modification of my sentence of Criminal Sale of Controlled Substance in the first degree as a First Felony Drug Offender, as authorized by Penal Law § 70.71(2).

4. I request an Order Granting an evidentiary hearing as authorized by CPL § 440.30[5] in order to make findings of fact essential to the determination thereof.

5. This affidavit is made upon my personal knowledge and upon information and belief. The sources of my knowledge and the basis of my belief being; (a) my Sentence and Commitment Sheet for the underlying conviction; (b) the Plea Allocution of my 2003 conviction, confirming my status, at the time, as a predicate violent offender.

6. As a pro se litigant, I request that my claims, "however inartfully pleaded" be held "to less stringent standards than formal pleadings drafted by lawyers..."<sup>1</sup>

#### FACTUAL BACKGROUND

7. On March 5, 2012, I, Johnny Rodriguez, was indicted along with alleged co-defendant, Roderick Reyes, by a New York County Grand Jury under original indictment number 1009/2012. On March 7, 2012 I was arrested by members of the New York Police Department. I was initially charged with 69 counts of offenses, including Criminal Sales of Firearm, and several possession charges of Controlled Substance.

8. On or about June 29, 2012, the 1009/2012 indictment became superceded by the new 3051/2012 indictment, adding charges against me. I entered a plea of not guilty.

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1. Haines v. Kerner, 404 U.S. 519, 520 (1972)

9. On May 10, 2019 I was convicted, after a jury trial, of the relevant charges: two counts of Criminal Sale of a Controlled Substance in the first degree; one count of Criminal Sale of a Firearm in the third degree; one count of Attempted Criminal Possession of a Weapon in the second degree; and, one count of Attempted Sale of a Firearm in the third degree.

10. I was subsequently sentenced, as a persistent violent felony offender, to 30 years to life. I was sentenced to 30 years for the two counts of Criminal Sale of Controlled Substance in the first degree; 25 years to life for Criminal Possession of a Weapon in the second degree, Criminal Sale of a Firearm in the third degree, and Attempted Criminal Possession of a Weapon in the second degree; and, 2 to 4 years for Attempted Criminal Sale of a Firearm in the third degree and Attempted Criminal Possession of a Weapon in the third degree.<sup>2</sup>

#### LEGAL ARGUMENT

11. CPL § 440.20(1) provides in relevant part: "At any time after the entry of a judgment, the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law." I assert that the 30 year sentence for

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2. See Exhibit A



Criminal Sale of Controlled Substance in the first degree was unauthorized.

12. In order to receive a sentence of 30 years for Criminal Sale of Controlled Substance in the first degree, the defendant must be a "second felony drug offender previously convicted of a violent offense" as authorized in NY Penal Law § 70.71(4)(b)(i). The term "'second felony drug offender' means a second felony offender as that term is defined in subdivision one of section 70.06 of this article,..."<sup>3</sup>

13. The definition of second felony offender states in relevant part:

- (a) A second felony offender is a person, other than a second violent felony offender as defined in section 70.04, who stands convicted of a felony defined in this chapter, other than a class A-1 felony, after having previously been subjected to one or more predicate felony convictions as defined in paragraph (b) of this subdivision.<sup>4</sup>

I cannot be deemed a second felony offender as defined in NY Penal Law § 70.06(1)(a) because the instant conviction is my first drug offense, and I have been adjudicated as a second violent felony offender in 2003 under my prior conviction's indictment number, 4817/2003.<sup>5</sup> Because I am not a second felony drug offender, and I am a persistent violent felony offender with a first time drug offense, it was objectively unreasonable to sentence me under a criteria that does not apply to me.

3. PL § 70.71 (1)(b)

4. PL § 70.06 (1)(a), emphasis added

5. See Exhibit B, pg 2

14. As a first time drug felony offender I should be sentenced to a range of 8 to 20 years as authorized by NY Penal Law § 70.71 (2) (b) (i). Although there are a dearth of cases on this issue, there are cases that permitted resentencing or modification when the sentence was illegal.<sup>6</sup>

15. Modification of my sentence must be granted. The erroneous and illegal 30 years imposed on me enhances the minimum term of my indeterminate sentence. Under the instant sentence, I would need to complete the 30 years before I am eligible and considered for parole—instead of completing the 25 years.<sup>7</sup>

IN CLOSING, this sentence should be Set Aside and modified for the purpose of allowing me to receive the correct sentencing range for the requisite that I satisfy as a first time drug felony offender.

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6. See People v. Fuller, 119 A.D.2d 692 (2nd Dept. 1986)(sentence of 10 to 20 years imprisonment was illegal and must be vacated because the crime of attempted murder in the second degree is not a class B armed felony); See People v. Coleman, 278 A.D.2d 891 (4th Dept. 2000)(We agree with defendant, however, that the sentence imposed for attempted petit larceny is illegal. The maximum permissible sentence for attempted petit larceny, a class B, is a definite sentence of imprisonment not to exceed three months); See People v. Hill, 302 A.D.2d 958 (4th Dept. 2003); See People v. Inverso, 20 Misc.3d 1107(A)(the court illegally sentenced defendant as a mandatory persistent violent felon on the charge of robbery in the third degree, a non-violent felony, under indictment 7858/93. Accordingly, this court's sentence on the count is vacated and defendant will be produced before this court for resentencing on that count)

7. NY Penal law § 70.40(1)(a)(iii): "A person who is serving one or more than one indeterminate sentence of imprisonment and one or more than one determinate sentence of imprisonment, which run concurrently may be paroled at any time after the expiration of the minimum period of imprisonment of the indeterminate sentence or sentences, or upon the expiration of six-sevenths of the term of imprisonment of the determinate sentence or sentences, whichever is later."

Respectfully submitted,

J. Rodriguez  
Johnny Rodriguez, 13A4026  
Downstate Correctional Facility  
Box F  
Red Schoolhouse Road  
Fishkill, NY 12524-0445

Sworn to before me on this

22<sup>nd</sup> day of JANUARY, 2020

J. Carmichael  
Notary Public





AFFIDAVIT OF SERVICE

STATE OF NEW YORK ) ss.:  
COUNTY OF DUTCH ESS)

Johnny Rodriguez, being duly sworn, deposes and says that:

1. That I am over eighteen years of age and a party to this action.

2. That on the 23 day of JANUARY, 2020, I served upon the following party(ies):

Supreme Court of New York  
New York County  
100 Centre Street  
New York, N.Y. 10013

Cyrus R. Vance, Jr.  
One Hogan Place  
New York, N.Y. 10013

A true copy of the annexed:

CPL § 440.20 (1) Motion to Set Aside Verdict, under Ind. No. 3051/2012  
Exhibit A and B enclosed

By depositing the same enclosed in a post paid (Regular Mail/Certified Mail Return Receipt Requested) properly addressed wrapper, in an official depository at the Downstate Correctional Facility, Box F, Fishkill, New York 12524 under the exclusive care and custody of the facility officials, addressed to the above party(ies) that being the address(es) designed for such purposes to be delivered by U.S. Postal Service.

So sworn,

J. Rodriguez

Sworn to before me this

22<sup>nd</sup> Day of JANUARY, 2020  
J. Carmichael  
NOTARY PUBLIC



# EXHIBIT

# A



## UNIFORM SENTENCE &amp; COMMITMENT

UCS-854(8/2011)

STATE OF NEW YORK  
 SUPREME COURT, COUNTY OF NEW YORK  
 PRESENT: HON MCLAUGHLIN, EDWARD J

Court Part: 93  
 Court Reporter: L CASTELLANO  
 Superior Ct. Case #: 03051-2012



The People of the State of New York				Accusatory Instrument Charge(s)	Count #	Law/Section & Subdivision
-vs- JOHNNY RODRIGUEZ				1 CSCS3	1	PL 220.39(01)
Defendant				2 CPCS5	5	PL 220.06(05)
Male	05/10/1978	07847012M	65335081Y	3 CPCS3	10	PL 220.16(01)
Sex	DOB	NYSID #	Criminal Justice Tracking #	4 CSCS3	12	PL 220.39(01)
				Date(s) of Offense:	04/04/2011	To 03/07/2012

THE ABOVE NAMED DEFENDANT HAVING BEEN CONVICTED BY [ ☐ PLEA OR ☒ VERDICT ], THE MOST SERIOUS OFFENSE BEING A [ ☒ FELONY OR ☐ MISDEMEANOR OR ☐ VIOLATION ], IS HEREBY SENTENCED TO:

Crime	Count #	Law/Section & Subdivision	SMF, Hate or Terror	Minimum Period	Maximum Term	Definite / Determinate **	Post-Release Supervision	CITN
1 CSCS3	1	PL 220.39(01)				15 Y (Det)	3 Y	
2 CSCS3	3	PL 220.39(01)				15 Y (Det)	3 Y	
3 CSCS3	6	PL 220.39(01)				15 Y (Det)	3 Y	
4 CSCS3	9	PL 220.39(01)				15 Y (Det)	3 Y	
5 CSCS3	12	PL 220.39(01)				15 Y (Det)	3 Y	

\*\* NOTE: For each DETERMINATE SENTENCE imposed, a corresponding period of POST-RELEASE SUPERVISION MUST be indicated [PL § 70.45].

☒ Counts shall run CONCURRENTLY with each other ☒ Count(s) 78, 79 shall run CONSECUTIVELY to count(s) 77

☐ Sentence imposed herein shall run CONCURRENTLY with \_\_\_\_\_ and/or CONSECUTIVELY to \_\_\_\_\_

☐ Sentence imposed herein shall include a CONSECUTIVE \_\_\_\_\_ term of [ ☐ PROBATION OR ☐ CONDITIONAL DISCHARGE ].

☒ Conviction includes: WEAPON TYPE: \_\_\_\_\_ and/or DRUG TYPE: DANGEROUS DRUG, OPIUM.

☐ Charged as a JUVENILE OFFENDER- age at time crime committed: \_\_\_\_\_ years ☐ Court certified the Defendant a SEX OFFENDER [Cor. L § 168-d]

☐ Adjudicated a YOUTHFUL OFFENDER [CPL § 720.20] ☐ CASAT ordered [PL § 60.04(6)]

☐ Execute as a sentence of PAROLE SUPERVISION [CPL § 410.91] ☐ SHOCK INCARCERATION ordered [PL § 60.04(7)]

☐ Re-sentenced as a PROBATION VIOLATOR [CPL § 410.70]

☒ As a: ☐ Second ☐ Second Violent ☐ Second Drug ☐ Second Drug w/prior VFO ☐ Predicate Sex Offender **FELONY OFFENDER**

☐ Predicate Sex Offender w/prior VFO ☐ Second Child Sexual Assault ☐ Persistent ☒ Persistent Violent

Paid Not Paid Deferred (If deferred, court must file written order [CPL § 420.40(5)]) Paid Not Paid Deferred (If deferred, court must file written order [CPL § 420.40(5)])

<input type="checkbox"/> Mandatory Surcharge	\$300.00	<input type="checkbox"/> Crime Victim Assistance Fee	\$25.00
<input type="checkbox"/> Fine	\$	<input type="checkbox"/> Restitution	\$
<input type="checkbox"/> DNA Fee	\$50.00	<input type="checkbox"/> Sex Offender Registration Fee	\$
<input type="checkbox"/> DWI/Other	\$	<input type="checkbox"/> Supplemental Sex Off. Victim Fee	\$

THE SAID DEFENDANT BE AND HEREBY IS COMMITTED TO THE CUSTODY OF THE:

☒ NYS Department of Correctional Services (NYDOCS) until released in accordance with the law, and being a person sixteen (16) years or older not presently in the custody of the NYSDOCS, (New York City Department of Corrections) is directed to deliver the defendant to the custody of NYSDOCS as provided in 7 NYCRR Part 103.

☐ NYS Department of Correctional Services (NYDOCS) until released in accordance with the law, and being a person sixteen (16) years or older presently in the custody of NYSDOCS, defendant shall remain in the custody of the NYSDOCS.

☐ NYS Office of Children and Family Services in accordance with the law, being a person less than sixteen (16) years of age at the time the crime was committed.

☐ \_\_\_\_\_ County Jail/Correctional Facility

TO BE HELD UNTIL THE JUDGMENT OF THIS COURT IS SATISFIED.

## REMARKS:

CT 1,3,6,9,12,15,18,24,30,36,42,46,61,64,70 RUNS CONCURRENT TO EACH OTHER  
 CT 21, 27, 67, 72 RUN CONCURRENT TO EACH OTHER  
 CT 33, 58 CONCURRENT TO 45, 48, 52  
 54, 57, 74, 76 CONCURRENT.

Pre-Sentence Investigation Report Attached: ☐ Yes ☒ No

Order of Protection Issued: ☐ Yes ☒ No ☒ Amended Commitment: Original Sentence Date: 06/18/2013

Order of Protection Attached: ☐ Yes ☒ No

08/13/2013 NORMAN GOODMAN

Date

Clerk of the Court

by:

Signature

SENIOR COURT CLERK

Title

Commitment, Order of  
 Protection & Pre-Sentence  
 Report received by Correctional  
 Authority as indicated:

Official Name

Shield No.



STATE OF NEW YORK  
COURT: COUNTY OF NEW YORK

UNIFORM SENTENCE & COMMITMENT  
Overflow Sheet

Superior Ct. Case #: 03051-2012

People of the State of New York  
vs.  
JOHNNY RODRIGUEZ

Sex: Male  
DOB: 05/10/1978  
NYSID: 07847012M  
CJTN: 65335081Y  
Date of Offense: 04/04/2011

To: 03/07/2012

The above named defendant having been charged by way of indictment or SCI with:

Indictment/SCI Charges:	Count #	Law Section & Subdivision:	Indictment/SCI Charges:	Count #	Law Section & Subdivision:
CPCS4	14	PL 220.09(01)	CPCS3	31	PL 220.16(01)
CPCS3	23	PL 220.16(12)	CSCS1	33	PL 220.43(01)
CSCS3	24	PL 220.39(01)	CSCS2	39	PL 220.41(01)
CPCS3	25	PL 220.16(01)	CPCS3	41	PL 220.16(12)
CPCS4	26	PL 220.09(01)	CSCS3	42	PL 220.39(01)
CPCS3	28	PL 220.16(01)	CPCS3	43	PL 220.16(01)
CPCS3	29	PL 220.16(12)	CSF3	48	PL 265.11(01)
CSCS3	30	PL 220.39(01)	ATT-	56	PL 110-265.02(01)

The above named defendant having been convicted of the most serious offense being a

☒ Felony ☐ Misdemeanor ☐ Violation by ☐ Plea ☒ Verdict for the crimes of:

Crime	Count #	Law/Section & Subdivision	SMF/Hate/Terrorism	Min. Term	Max. Term	Definite/Determinate	Post Release Supervision	CJTN
CSCS3	15	PL 220.39(01)				15 Y (Det)	3 Y	
CSCS3	18	PL 220.39(01)				15 Y (Det)	3 Y	
CSCS3	24	PL 220.39(01)				15 Y (Det)	3 Y	
CSCS3	30	PL 220.39(01)				15 Y (Det)	3 Y	
CSCS3	36	PL 220.39(01)				15 Y (Det)	3 Y	
CSCS3	42	PL 220.39(01)				15 Y (Det)	3 Y	
CSCS3	46	PL 220.39(01)				15 Y (Det)	3 Y	
CSCS3	61	PL 220.39(01)				15 Y (Det)	3 Y	
CSCS3	64	PL 220.39(01)				15 Y (Det)	3 Y	
CSCS3	70	PL 220.39(01)				15 Y (Det)	3 Y	
CSCS2	21	PL 220.41(01)				17 Y (Det)	5 Y	
CSCS2	27	PL 220.41(01)				17 Y (Det)	5 Y	
CSCS2	67	PL 220.41(01)				17 Y (Det)	5 Y	

08/13/2013 NORMAN GOODMAN  
Date Clerk of the Court

by:

Signature

SENIOR COURT CLERK  
Title



STATE OF NEW YORK

COURT: COUNTY OF NEW YORK

UNIFORM SENTENCE & COMMITMENT  
Overflow Sheet

Superior Ct. Case #: 03051-2012

People of the State of New York  
vs.  
JOHNNY RODRIGUEZ

Sex: Male

DOB: 05/10/1978

NYSID: 07847012M

CJTN: 65335081Y

Date(s) of Offense: 04/04/2011

To: 03/07/2012

The above named defendant having been charged by way of indictment or SCI with:

Indictment/SCI Charges:	Count #	Law Section & Subdivision:	Indictment/SCI Charges:	Count #	Law Section & Subdivision:
CSCS3	61	PL 220.39(01)	CUDP2	79	PL 220.50(03)
CPCS3	65	PL 220.16(01)	UPMAR	80	PL 221.05(00)
CSCS2	67	PL 220.41(01)	CSCS3	3	PL 220.39(01)
CPCS5	8	PL 220.06(05)	CSCS3	6	PL 220.39(01)
CPCS3	13	PL 220.16(01)	CPCS3	7	PL 220.16(01)
CPW3	53	PL 265.02(08)	CSCS3	15	PL 220.39(01)
CPCS3	59	PL 220.16(01)	CPCS3	16	PL 220.16(01)
CPCS3	73	PL 220.16(01)	CPCS4	17	PL 220.09(01)

The above name defendant having been convicted of the most serious offense being a

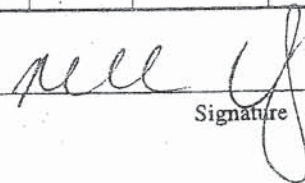
☒ Felony ☐ Misdemeanor ☐ Violation by ☐ Plea ☒ Verdict for the crimes of:

Crime	Count #	Law/Section & Subdivision	SMF/Hate/Terrorism	Min. Term	Max. Term	Definite/Determinate	Post Release Supervision	CJTN
CSCS2	72	PL 220.41(01)				17 Y (Det)	5 Y	
CSCS1	33	PL 220.43(01)				30 Y (Det)	5 Y	
CSCS1	58	PL 220.43(01)				30 Y (Det)	5 Y	
CPW2	45	PL 265.03(03)		25 Y	Life			
CSF3	48	PL 265.11(01)		25 Y	Life			
ATT-CPW 2	52	PL 110-265.03(03)		25 Y	Life			
ATT-CSF 3	54	PL 110-265.11(01)		2 Y	4 Y			
ATT-CPW 3	57	PL 110-265.02(07)		2 Y	4 Y			
CPCS3	74	PL 220.16(01)				15 Y (Det)	3 Y	
CUDP2	79	PL 220.50(03)				1 year (Def)		
RESARR	77	PL 205.30(00)				1 year (Def)		
CUDP2	78	PL 220.50(02)				1 year (Def)		
CPCS4	76	PL 220.09(01)				9 Y (Det)	3 Y	

08/13/2013

NORMAN GOODMAN

by:



SENIOR COURT CLERK

Date

Clerk of the Court

Signature

Title

# EXHIBIT

# B



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Page 1

SUPREME COURT  
CRIMINAL TERM

NEW YORK COUNTY  
PART 71

PEOPLE OF THE STATE OF NEW YORK,

INDICTMENT #  
4817/2003

-against-

JOHNNY RODRIGUEZ,

Defendant

Sentence

100 Centre Street  
New York, New York 10013  
December 17, 2003

B E F O R E:

THE HONORABLE CAROL BERKMAN, J.S.C.  
JUSTICE OF THE SUPREME COURT

A P P E A R A N C E S:

For the People:

ROBERT MORGENTHAU, ESQ.  
District Attorney New York County  
By: A.D.A. Bales, Esq.  
Assistant District Attorney  
(For the People)

For the Defendant:

KAREN COLLINS, ESQ.  
RUTH YANG, ESQ.  
New York, New York  
(Attorneys for Johnny Rodriguez)

Lourdes Torres-Fuster, Senior Court Reporter  
For: Retired Senior Court Reporter Howard Sonenson

JOHNNY RODRIGUEZ - SENTENCE

Pg. 2

1 COURT CLERK: Number 20, Jorge Rodriguez and Johnny  
2 Rodriguez.

3 MS. COLLINS: Karen Collins and Ruth Yang for Mr.  
4 Rodriguez.

5 THE COURT: Johnny Rodriguez has previously been  
6 adjudicated a violent predicate felony offender.

7 He is before this Court for sentence on his plea to  
8 Attempted Criminal Possession of a Weapon in the  
9 third-degree.

10 People wish to be heard?

11 A.D.A. BALES: No, your Honor.

12 THE COURT: Counsel.

13 MS. YANG: I rely on the negotiated promise.

14 However, Mr. Rodriguez did request if you would  
15 consider allowing him to stay execution until after the  
16 holidays so his family can visit him at Rikers.

17 THE COURT: Anything you want to say, Mr. Rodriguez,  
18 before sentence is pronounced?

19 THE DEFENDANT: No.

20 THE COURT: Mr. Rodriguez is sentenced to a term of  
21 four years in state prison.

22 He forfeited all that bail.

23 I decline to stay execution of sentence.

24 Assessment is imposed.

25 Advise him of his right to appeal.

Lourdes Torres-Fuster, Senior Court Reporter

JOHNNY RODRIGUEZ - SENTENCE

1 With regard to Jorge Rodriguez.

2 A.D.A. BALES: The People will not be representing this  
3 case to the Grand Jury.

4 I have a motion to dismiss the felony complaint.

5 THE COURT: Basically dismissed.

6 \*\*\*\*\*

7 (Proceedings were concluded)

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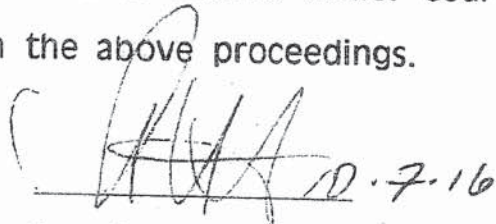
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I, Lourdes Torres-Fuster, Senior Court Reporter hereby  
certify the foregoing to be a true and accurate transcript  
of the original stenographic record of Retired Senior Court  
Reporter Howard Sonenson in the above proceedings.



Lourdes Torres-Fuster,  
Senior Court Reporter





Supreme Court  
of the  
State of New York

Part 75 - New York County

The People of the State of New York

INDICTMENT: 3051-2012

against

MOTION FOR CPL §440.20

JOHNNY RODRIGUEZ,

CALENDAR DATE: April 24, 2020

Defendant

**ORDERED** that upon the papers submitted, this motion is  
hereby

GRANTED                     

DENIED                     ✓                    

Date: 4/20/20

Hon.                     

*HON. R. MANDELBAUM*

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CRIMINAL TERM: PART 75

-----X  
THE PEOPLE OF THE STATE OF NEW YORK :

-against- : DECISION AND ORDER

JOHNNY RODRIGUEZ, : Ind. No. 3051/2012

Defendant. :  
-----X

ROBERT M. MANDELBAUM, J.:

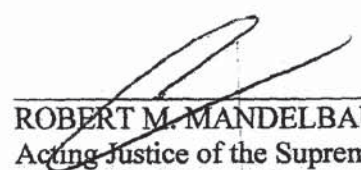
Defendant was lawfully sentenced as a class A second felony drug offender (see Penal Law § 70.71 [1] [b], [4] [a]), which means a second felony offender as defined in Penal Law § 70.06 (1) who stands convicted of a class A drug felony (see Penal Law § 70.71 [1] [b]). Under Penal Law § 70.06 (1) (a), a second felony offender is a person who stands convicted of a felony after having previously been subjected to one or more predicate felony convictions. That a second felony offender is further defined as a person “other than a second violent felony offender as defined in [Penal Law § 70.04]” (id.) serves only to distinguish the authorized prison sentences for violent predicate felons from nonviolent ones, and does not, as defendant argues, mean that a class A felony drug offender whose predicate felony conviction was violent must be sentenced merely as a first felony offender, whereas only one whose predicate felony was nonviolent, and therefore less serious, is subject to enhanced sentencing as a second felony offender. That defendant misreads the statutory scheme is conclusively established by Penal Law § 70.71 itself, which expressly contemplates second felony drug offender status for both those “whose prior felony conviction was not a violent felony” (Penal Law § 70.71 [3] [a]) and those “whose prior felony conviction was a violent felony” (Penal Law § 70.71 [4] [a]).



Accordingly, defendant's motion to set aside the sentence is denied.

This opinion shall constitute the decision and order of the court.

Dated: April 20, 2020  
New York, New York



ROBERT M. MANDELBAUM  
Acting Justice of the Supreme Court